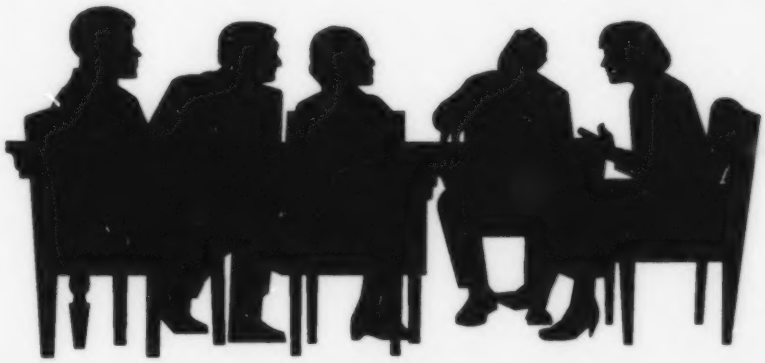
CONTAMINATED SITES

Liability Issues Task Force



Final Report to Minister of the Environment

APRIL 1992

92-04523/

April 14, 1992

Honourable Ralph P. Klein
Minister of Environment
130 Legislature Building
Edmonton, Alberta
T5K 2B6

Dear Minister:

Re: Contaminated Sites - Liability Issues Task Force

We have the honour of presenting the Report of the Contaminated Sites - Liability Issues Task Force.

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BACKGROUND

Significant public concern has been expressed about the identification and clean-up of contaminated sites. Various jurisdictions throughout Canada are moving to address this issue, seeking to develop solutions which will protect the public and the environment but also provide fair treatment to all parties potentially affected by such sites.

Major issues related to this matter include:

- identifying and designating contaminated sites;
- determining what action should be taken to contain the contamination or to improve the state of the site;
- determining who will actually do the required work;
- determining who should bear the cost of cleaning up contaminated sites, and in what proportion;
- determining when responsibility for cleanup of contaminated sites should arise;
- considering whether there should be any time limit beyond which there would be no further liability for contaminated sites;
- providing for transitional provisions for applying the new regime to sites which were contaminated at an earlier time, perhaps in compliance with all of the laws and regulations in effect at that time.

Alberta has taken steps towards dealing with contaminated sites. Bill 53, the *Alberta Environmental Protection and Enhancement Act*, was introduced in the Legislature in the 1991 session. As it was late in the session, Bill 53 was not passed. This has provided an opportunity for further public consultation.

Division 3 of Part 4 of Bill 53 is drafted to deal specifically with contaminated sites. It allows the Director to designate a contaminated site, and authorizes him to issue an environmental protection order for containing the contamination or requiring cleanup of the designated site. These provisions make reference to the "person responsible for the contaminated site", who may be required both to clean up the site and to bear all costs of such cleanup. Bill 53 contemplates that the definition of "person responsible for the contaminated site" would be contained in regulations, not in the Act itself.

Because the definition has significant implications for anyone who might be involved with or affected by a contaminated site, Alberta Environment is seeking the advice and assistance of these parties in the development of this definition. The Department has also established a Task Force consisting of members representing various interests to review the issues related to this matter and to make recommendations to the Minister on the definition of "person responsible for the contaminated site."

PURPOSE OF THE TASK FORCE

The purpose of the Task Force is to make recommendations on:

- who should be responsible for the clean-up of contaminated sites;
- a definition of "person responsible for the contaminated site" under the proposed Alberta Environmental Protection and Enhancement Act and associated regulations; and
- the principles and objectives underlying the definition.

TERMS OF REFERENCE OF THE TASK FORCE

The Terms of Reference of the Task Force are to:

- hold meetings of the Task Force as necessary;
- hold a workshop with representatives of key interest groups;
- prepare a report including the recommendations of the Task Force regarding the parties who should be responsible for the clean-up of contaminated sites:

1) that have been designated by the Director under Division 3 of Part 4 of Bill 53, including a definition of "person responsible for the contaminated site" and the principles and objectives upon which the definition is based;

2) where there is contamination but the site is not designated as contaminated, under Division 3, Part 4.

In formulating its recommendations, the Task Force should take into consideration the definition of "person responsible" in the definition section of Bill 53, which relates to responsibility for a substance.

The Task Force was asked to submit its recommendations to the Minister early in 1992.

MEMBERS OF THE TASK FORCE

David Phillip Jones, Q.C. - Chairman	An Edmonton lawyer; also current Chair of the Hazardous Chemicals Advisory Committee
D'Arcy Donald	A realtor in Grande Prairie; Chairman of the Alberta Real Estate Association's Governmental Affairs Committee
Alan Gerard	A Senior Credit Manager with a major Canadian Chartered Bank, representing the Canadian Banking Association
David J. Lobay	An Edmonton lawyer; writer and lecturer on insolvency and environmental law
Gordon Miller	A Vegreville area farmer and President of the Alberta Association of Municipal Districts and Counties
Al Schulz	Director of the Pollution Control Division, Alberta Environment.
B.A.R. (Quincy) Smith, Q.C.	A Calgary lawyer, writer and lecturer with expertise in bankruptcy matters.
Lillian Staroszik	An Alderman on Edmonton City Council; represents the Alberta Urban Municipalities Association
Louise Swift	An administrator with the Environmental Resource Centre, Edmonton; represents the Alberta Environmental Network
Donna Tingley	Executive Director of the Environmental Law Centre in Edmonton
Millard Wright	Manager of Corporate Safety and Environmental Group for Gulf Canada Resources Limited; represents the Canadian Petroleum Association

Members who were unable to attend a particular meeting were invited to send a replacement from the organization they represent.

The Task Force benefited from assistance from members of the departmental staff: Ron Hicks, Executive Director of the Corporate and Strategic Management Division; Kim Lalonde, Senior Manager of Projects and Issues; John Richards, Research Officer; and Karin Holmgren, our recording secretary; as well as from a legal consultant to the department, Cindy Feduniw Chiasson, and a consultant on the workshop, Felicity Edwards.

PROCEDURE USED BY THE TASK FORCE

The Task Force was constituted in late December 1991, and was given a tight timetable to make its recommendations to the Minister by early 1992.

The Task Force met on January 7, 17 and 29, and February 10 and 21, 1992. The Task Force used a number of hypothetical case studies as a sounding board to develop and test their recommendations. The case studies are reproduced in Appendix A.

In addition, the Task Force reviewed a summary prepared by the legal consultant to the Department, Cindy Feduniw Chiasson, about the legislative regimes dealing with contaminated sites in a number of other jurisdictions. These are reproduced in Appendix B.

The Task Force held an invitational workshop on Monday, March 16, 1992 in Edmonton. The purpose of the workshop was to gather input from a larger number of interested persons and groups. The list of persons attending the workshop is contained in Appendix C.

This is the Task Force's Report to the Minister, who will decide what course of action to adopt in the Bill which will be introduced in the Legislature.

THE PROVISIONS IN BILL 53

The draft provisions relating to contaminated sites are contained in Division 3 of Part 4 of Bill 53.

Division 3

Contaminated Sites

111 *In this Division, "person responsible for the contaminated site" means a person responsible for the contaminated site within the meaning of the regulations.*

112 *(1)* *The Director may designate any area of the environment as a contaminated site where the Director is of the opinion that a substance that may cause, is causing or has cuased a significant adverse effect is present in the environment.*

(2) *Subsection (1) applies notwithstanding that any or all of the following may apply:*

(a) *a reclamation certificate has been issued in respect of the contaminated site;*

(b) *an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;*

(c) *the substance was released in accordance with this Act or any other law;*

(d) *the release of the substance was not prohibited under this Act;*

(e) *the substance originated from a source other than the contaminated site.*

(3) *The Director may cancel a designation of a contaminated site.*

113 (1) *Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.*

(2) *An environmental protection order made under subsection (1) may*

(a) *require the person to whom the order is directed to do any work or carry out any measures the Director considers necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 99, and*

(b) *in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.*

114 *The Director shall give notice of his decision to designate an area of the environment as a contaminated site under section 112 and of the issuance of an environmental protection order under section 113 to any of the persons responsible for the contaminated site that the Director considers appropriate and to the local authority of the municipality in which the contaminated site is located.*

115 *The Minister may*

(a) *in accordance with any applicable regulations, or*

(b) *in the absence of any applicable regulations, in the manner and amount he considers appropriate*

pay compensation to the owner of land who suffers loss or damage as a result of the application of this Division.

COMMENTS ON BILL 53

The following comments can be made on the contaminated sites provisions contained in Bill 53:

Division 3 not applicable to emergencies

- The provisions of Division 3 will probably not be used to deal with emergency situations arising out of contaminated sites. Other provisions in Bill 53 deal more directly with emergencies. Accordingly, the steps provided for in Division 3 will likely be taken in a deliberate, consultative fashion extending over some period of time.

The underlying philosophy of the Act is not clearly articulated

- Bill 53 does not clearly articulate that the object of an environmental protection order is to be remedial, to clean up a contaminated site, regardless of fault, and not to punish the contaminator (or at least to make the contaminator bear the cost of clean-up).

- The underlying philosophy is important when one attempts to determine who should bear the costs of clean-up.

- If the underlying theme is punishment, then a person's lack of fault would be a defence against having to pay for the costs of clean-up. Thus, a blameless landowner could not be asked to pay the cost of clean-up (and maybe should not have to suffer the loss in the value of the land, either). Similarly, a polluter may be morally blameless in some circumstances--e.g., if he did not know that contamination was occurring, or did not know that the substance involved was a contaminant, or complied with all applicable common law, regulatory and scientific standards in effect at the time the contamination occurred. In what circumstances should lack of fault be a defence?

- If the underlying theme is remedial, to deal with the contamination in an appropriate manner, the Act will not necessarily take into account the existence or lack of fault for the purpose of allocating costs. Thus, an "innocent polluter" may nevertheless be required to bear some or all of the costs of dealing with the contamination. An "innocent landowner" may have to bear some of the costs too, even though he did not cause--or perhaps even know about--the pollution. Lenders may suffer because the value of their security is diminished. Society may have to bear some or all of the costs if it is important to have the contaminated site cleaned up but there is no identifiable or available "guilty" person who can be made to pay the costs.

Designation of contaminated sites

- Section 112 does not contemplate that the Director will necessarily designate all contaminated sites. He may designate some, but not others.

- Bill 53 does not contain a definition of "contaminated site" or of "contamination". Rather, section 112(1) describes the circumstances in which the Director may designate any area of the environment as a contaminated site. It does not provide completely unfettered power for the Director to designate a site as contaminated. The provision contains a number of preconditions for designation of the contaminated site: namely, (1) the Director must [reasonably] have the opinion, (2) that the substance may cause, is causing or has caused, (3) a significant adverse effect, and (4) is present in the environment. All of these preconditions could be challenged in an appeal to the Environmental Appeal Board under section 83(1)(h).

- Designation under section 112 does not have any direct consequences with respect to containment or clean-up. Positive action is implemented by an environmental protection order under section 113.

- Designation under section 112 may well adversely affect the value of the land. Section 115

provides a discretionary power for the Minister to pay compensation in certain circumstances.

- Section 112 does not contain any reference to "person responsible", so the definition recommended by the Task Force has no operational effect on what sites can be designated or on the designation process. Although section 114 requires the Director to give notice of his decision to designate a contaminated site, it is not clear that this requires prior notification that would allow an affected party the opportunity to make representations before the designation occurred.

Environmental protection orders

- Section 113 contemplates that the recipient of an environmental protection order will be responsible for both the physical actions required to contain or clean up the contamination, as well as the financial costs for doing so. It does not provide a vehicle for separating responsibility for physical clean-up from financial responsibility. Accordingly, the definition of "person responsible" is made to perform two functions, when it might be desirable to separate out the person(s) responsible for the physical clean-up from the person(s) responsible financially. The identity of the two groups may well differ.

- One might wrongly conclude from section 113 that the Director can only require a "person responsible" to do those things set out in section 113 (2) (a) and (b).

Section 113(2) states that an environmental protection order issued in relation to a contaminated site may contain the following provisions:

113(2) An environmental protection order made under subsection (1) may

(a) require the person to whom the order is directed to do any work or carry out any measures the Director considers necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 99, and

(b) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.

- Section 99(2) provides that:

99(2) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(h) construct, improve, extend or enlarge the plant, structure or thing if necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order.

Section 229 is also relevant for determining the possible contents of an environmental protection order. It provides that:

229(1) In addition to any other requirements that may be included in an environmental protection order issued under this Act, such an order may contain provisions

(a) requiring the person to whom it is directed

(i) to maintain records on any relevant matter,

(ii) to report periodically to the Director,

(iii) to provide environmental audits to the Director,

(iv) to submit to the Director any information, proposal or plan setting out any action to be taken by the person with respect to the subject-matter of the order as specified by the Director, and

(v) to take any other measure that the person making the order considers necessary to

(A) facilitate compliance with the order, or

(B) protect or restore the environment,

(b) fixing the manner or method of, or the procedures to be used in, carrying out the measures required by the order, and

(c) fixing the time within which any measure required by the order is to be commenced and the time within which the order or any portion of the order is to be complied with.

The relationship between sections 113(2), 229 and 99 could be usefully flagged in Division 3, so that it would be a more meaningful self-contained unit dealing with contaminated sites.

- In particular, it would be desirable to indicate that the Director can require an action plan to be prepared, prior to actually ordering some specific clean-up action to occur. Section 229 probably permits this, but this is hidden on a reading of section 113(2) by itself.

- Section 113(1) contemplates that the order may be issued to "a person responsible", that person shall do what is required by the order, regardless of the existence of or responsibility of any other person who might be a "person responsible" (whether or not named in the order), and regardless of whether it is fair in the circumstances to look to the person named in the order to undertake (and pay for) the curative actions.

- Section 113 does not prescribe the action to be taken; it does not indicate whether the contamination is to be contained or the site is to be rehabilitated (or to what degree of rehabilitation). That decision is left to the discretion of the Director.

- An appeal lies to the Environmental Appeal Board under section 83(1)(f) against an environmental protection order issued under section 113.

Joint and several liability

- Under section 228, all of the persons to whom an environmental protection order is addressed are jointly and severally liable both for carrying out the terms of the order and for payment of any costs incurred by the Director in carrying out the terms of the order.

- One danger is that the environmental protection order may be addressed to many different persons--in which case each of them is totally responsible for all of the actions and costs involved in any aspect of complying with the order, regardless of whether the particular person has discharged the particular action he is required to take under the order. Although the Director might issue several orders with respect to a particular designated site, each addressed to only one person who is to take the specified action, there is nothing in Bill 53 which requires this. The natural temptation would be to issue one omnibus order against all possible responsible persons, thereby making each jointly and severally liable, without regard to any concept of fairness which would limit the actions or financial contribution which could reasonably be expected of that person--so as to increase the chance that one of them might undertake the required actions, or to increase the number of persons to whom the Director could look for recompense if he has to undertake the actions himself.

- The joint-and-several liability attaching to an environmental protection order under section 228 only relates to the costs incurred by the Director in carrying out the terms of the order. In some cases, the Director will step in where there is a default, where none of the named parties takes the curative action required by the order. Section 228 allows the Director to look at any and all persons named in the order, regardless of the degree of fault attributable to any particular person. It does not specifically deal with the allocation of costs incurred by a "person responsible"--someone who complies with the order.

Common law may--or may not--entitle that person to seek financial contribution from some or all of the other persons who are named in the order (and perhaps against other persons not named in the order, too, such as identifiable but unnamed "persons responsible", or under the law of negligence); section 228 simply does not deal with this. Further, section 228 does not contemplate that the Director can decide how the costs of clean-up or containment should be allocated between the responsible parties--particularly as a separate question from determining who is going to do the physical clean-up.

Transitional provisions/retroactivity

- Bill 53 does not recognize that environmental standards may rise over time. On the one hand, it does not explicitly contain any transitional provisions to deal with the application of the new regime to sites which were contaminated prior to the enactment of Bill 53, perhaps in full compliance with all laws and regulations in effect at that time. On the other hand, the same type of problem could also arise with respect to events which occur completely after the enactment of Bill 53--if new forms of contamination are subsequently recognized or higher standards are imposed.

Governmental Compensation

- Section 115 recognizes that it may be appropriate for the Government to pay compensation to landowners who suffered loss or damage as a result of the application of Division 3 of Part 4.

- Section 115 applies both to a landowner who is affected by the designation of a contaminated site, and to a landowner who is affected by an environmental protection order.

- No compensation is available under section 115 to a "person responsible" named in an environmental protection order if that person is not a landowner.

- The Minister (not the Director) makes the decision about compensation under section 115.

- There is no right to any compensation; compensation is totally discretionary.

- Section 115 contemplates that there might be regulations governing compensation. If so, the compensation must comply with the regulations. The possibility of regulations does not derogate from the discretionary nature of the compensation. Rather, the regulations would have the effect of restricting the circumstances in which the Minister's discretion could be exercised; it does not appear that the regulations could compel the Minister to pay compensation in any event in certain cases.

Time limits

- Bill 53 does not impose any time limit within which the Director must designate the site or issue the environmental protection order. It does not specifically state whether it is to be retroactive--i.e., cover sites which were contaminated prior to the Bill's coming into force. Bill 53 also does not provide any "statute of limitations" to protect a person from responsibility for a contaminated site.

RECOMMENDATIONS OF THE TASK FORCE

The Task Force makes the following recommendations.

STRUCTURE OF DIVISION 3

RECOMMENDATION 1:

DIVISION 3 SHOULD CONTAIN FIVE DISTINCT ELEMENTS–DESIGNATION OF SITES, ACTION TO BE TAKEN ON THE SITE, ALLOCATION OF FINANCIAL RESPONSIBILITY, GOVERNMENTAL COMPENSATION, AND APPEALS

The Task Force recommends that Division 3 should contain five distinct elements--the designation of contaminated sites; the formulation of an action plan to determine what action must be taken to deal with the contaminated site, including deciding what (if any) action should be taken on the site; the allocation of financial responsibility for containing the contamination or cleaning up the contaminated site, provisions dealing with the possibility of governmental compensation to anyone who suffered loss or damage as a result of the designation or clean-up; and the appeals process with respect to contaminated sites.

The principal recommendation is that section 113 should be redrafted to unbundle the responsibility for taking actions to contain the contamination or rehabilitate the site, from the allocation of financial responsibility for those actions.

DESIGNATING CONTAMINATED SITES

RECOMMENDATION 2:

THE DIRECTOR SHOULD RETAIN DISCRETION ABOUT WHETHER TO DESIGNATE A CONTAMINATED SITE

The process for designating contaminated sites under section 112 stands by itself. In general, no changes are required to section 112, and it is appropriate for the Director to retain discretion about whether to designate a particular contaminated site.

RECOMMENDATION 3:

THE DIRECTOR SHOULD GIVE PRIOR NOTICE OF HIS "INTENTION TO DESIGNATE" A SITE

The Task Force recommends that section 114 should be clarified to require the Director to give advance notice of his intention to designate a contaminated site.

The purpose of prior notice is two-fold: first, to encourage voluntary compliance without the need of formal action; and, secondly, to comply with the principles of natural justice in Administrative Law by giving a person who would be affected by the designation the opportunity to make representations prior to the designation.

Notice of Intention to Designate should be given to the owner (who would undoubtedly be affected by the designation), any other responsible person whom the Director thinks appropriate in the circumstances (such as the contaminator, who might not be the owner,) and to any other person whom the Director thinks appropriate in the circumstances (such as a neighbour, whose property value might be affected by the designation, or whose property might be affected by steps required to deal with the contamination).

The Act should provide that failure to give notice to any person does not invalidate the designation, any environmental protection order, or any cost allocation order.

Most members of the Task Force do not think that a Notice of Intention to Designate should be registered at the Land Titles Office, although an actual Designation would be registered (see Recommendation #4). Nor does the majority think that the Act should impose an obligation on a recipient of a Notice of Intention to Designate to disclose that Notice to a purchaser of the land, because the private law will probably deal adequately with the consequences of disclosure or non-disclosure. Thus, listing realtors will require vendors to disclose any environmental concerns in the listing agreement; and purchasers will make the absence of environmental concerns a condition of the transaction. Some members of the Task Force, however, think that a Notice of Intention to Designate should be made available to the general public.

RECOMMENDATION 4:

A DESIGNATION SHOULD BE FILED AT THE LAND TITLES OFFICE

The Task Force recommends that the Director should file a copy of the designation of the contaminated site at the Land Titles Office, to put anyone dealing with the land on notice about the contamination.

Because not all land in Alberta has been brought under the Land Titles Act, notification of the designation might have to be given to the Registrar of the Metis Settlement Land Registry, the appropriate provincial department responsible for unpatented provincial lands, and the appropriate federal department responsible for federal lands.

Similarly, because mineral rights are classified as "land" and it is conceivable that the mineral deposit could be contaminated, any designation of the minerals as a contaminated site should be registered with the appropriate provincial department which keeps track of Crown leases of minerals.

It may also be appropriate to register the designation of contaminated ground water on the title of the surface land, because the owners may be affected by their inability to use the water.

Finally, it might be desirable for the Department to keep a register of designations available for public inspection.

RECOMMENDATION 5:

THERE SHOULD BE PUBLIC NOTIFICATION OF A DESIGNATION

The Task Force recommends that there should be some form of publication of the designation of a contaminated site. The purpose of the publication would be to allow broader input into the development of the action plan for dealing with the site--beyond just the owner or those who fit within the category of "persons responsible".

CLEANING UP THE SITE

RECOMMENDATION 6:

THE ACT SHOULD RECOGNIZE THAT THERE MAY BE DISTINCT STEPS INVOLVED IN DECIDING HOW TO DEAL WITH A CONTAMINATED SITE--FROM FORMULATING AN ACTION PLAN, TO DECIDING WHO WILL DO THE ACTUAL WORK, TO DECIDING WHO WILL BEAR THE COST OF THE CLEAN-UP AND IN WHAT PROPORTION

Division 3 should be re-written to recognize that there will be a process involved in determining what needs to be done to the site, who will actually do it, and who will pay for the clean-up. For example, it is likely that the Director will not unilaterally dictate whether the contamination is to be contained or the site is to be restored to Garden-of-Eden quality; nor is the Director likely to dictate the precise steps to be taken without consultation with the affected parties. In most cases, there will be a process of identification, education and negotiation. An action plan will be developed. This should be recognized up-front in section 113, not hidden in section 229.

RECOMMENDATION 7:

THE ACT SHOULD INDICATE MORE CLEARLY WHAT THINGS THE DIRECTOR CAN REQUIRE IN AN ENVIRONMENTAL PROTECTION ORDER CONCERNING A CONTAMINATED SITE

Division 3 should be a more self-contained code relating to contaminated sites. The section on environmental protection orders (section 113 in Bill 53) should clearly indicate that the order can relate to any of the steps referred to in section 229. It would be helpful if these steps were set out in full in Division 3, or at least cross-referenced, so that the reader would appreciate what steps the Director can require to be taken with respect to the contaminated site.

RECOMMENDATION 8:

THE ACT SHOULD EXPLICITLY RECOGNIZE THAT THERE MAY BE MORE THAN ONE ENVIRONMENTAL PROTECTION ORDER, AND THAT DIFFERENT ORDERS MAY BE DIRECTED TO DIFFERENT PERSONS TO DO DIFFERENT THINGS

The orders should be as target-specific as possible. They should be directed to the actual person(s) to whom the Director is looking for the actions to be done. The Director should not be encouraged to issue one omnibus order to everyone under the sun, thereby engaging their

collective responsibility, without determining what tasks are within whose responsibility or competence, or without determining the fairness of allocating particular tasks to particular persons.

RECOMMENDATION 9:

MAINTAIN THE DIRECTOR'S ABILITY TO ORDER A RANGE OF ACTIONS–FROM NOTHING, TO CONTAINMENT, TO WHATEVER LEVEL OF REHABILITATION

The Task Force recommends that the Act maintain the Director's ability to determine the appropriate action to be taken with respect to particular contaminated sites.

Not all sites require rehabilitation to Garden-of-Eden standards. In some cases, no action is required. In other cases, containment is all that is required. In yet other cases, some level of rehabilitation would be appropriate.

Someone must make the decision about the appropriate action. The Task Force agrees that it is appropriate that the Director will make the first, operational decision when he issues the environmental protection orders; and that the ultimate decision may be made by the Minister after review of any appeal of such orders by the Environmental Appeal Board.

The Task Force does suggest, however, that there might be circumstances in which it would be appropriate for public input into the decision about the appropriate action to be taken. The Act could usefully refer to this possibility.

RECOMMENDATION 10:

THE ACT SHOULD CONTEMPLATE SOME FORM OF PUBLIC INPUT INTO THE ACTION PLAN

The Task Force thinks that public consultation will generally be desirable and assist the Director in determining how to exercise his discretion to determine whether the contamination should be maintained or whether the site should be cleaned up, and what standard of clean-up is appropriate. Accordingly, the Task Force recommends that the Act should provide for some form of public input into the action plan for dealing with the contaminated site.

However, because of the wide range of possible actions that may be required for a particular site (which is reflected in the wide range of possible contents in an environmental protection order), the Task Force does not think it is necessary for the Act to require a public hearing at this stage. We think it would suffice if the Act requires the Director to consider what form of consultation with directly affected parties (beyond "persons responsible") and the public would be appropriate in the circumstances. It would be helpful if such a provision were contained in Division 3, but it could also be added to section 229 (dealing with environmental protection orders).

RECOMMENDATION 11:

THE ACT SHOULD REQUIRE PRIOR NOTICE OF THE ISSUANCE OF AN ENVIRONMENTAL PROTECTION ORDER

The Task Force recommends that section 114 should be clarified to require prior notice of the Director's intention to issue an environmental protection order.

The purpose of giving prior notice is two-fold: first, to encourage the prospect of voluntary compliance; and, second, to comply with the requirements of natural justice in Administrative Law to give the potential recipient the opportunity to make representations.

Failure to give notice, however, should not automatically result in invalidity of the environmental protection order.

RECOMMENDATION 12:

THE ENVIRONMENTAL PROTECTION ORDER REQUIRING ACTION TO BE TAKEN ON THE SITE SHOULD BE DEALT WITH SEPARATELY FROM THE ALLOCATION OF FINANCIAL RESPONSIBILITY FOR DEALING WITH THE CONTAMINATION

Section 113 should be rewritten to unbundle the connection between the person(s) whom the Director identifies to take action to deal with the contamination, from the allocation of the resulting costs. It should not be assumed that the person who does the clean-up should necessarily be the person who bears all or even part of the costs.

It will also be necessary to consider whether the Director can require a person to take specific actions if the cost of those actions exceeds that person's fair share of the cost of the clean-up.

On the one hand, the person named in the environmental protection order could simply refuse to do the action, and the Director would then be forced to do the action himself and recover the costs from the appropriate people under section 232.

On the other hand, there may be a person who practically can undertake the required actions efficiently (and perhaps more cheaply than the Government) and is willing to do so--provided that does not mean that he is stuck with the costs, or with greater costs than would be his fair share. The Act should encourage such a person, and not penalize him. It may be appropriate to give the person a charge on the land or specifically recognize his right to payment for any portion of the costs which are properly allocated to others (such as the landowner).

SUGGESTED RE-WORDING OF SECTION 113

Section 113 might be redrafted as follows to reflect these recommendations:

113 *(1)* *The Director may issue one or more environmental protection orders to any one or more persons responsible for a designated contaminated site.*

(2) *An environmental protection order made under subsection (1) may*

(a) *require the person to whom it is directed*

(i) *to maintain records on any relevant matter,*
(ii) *to report periodically to the Director,*
(iii) *to provide environmental audits to the Director,*
(iv) *to submit to the Director any information, proposal or plan setting out any action to be taken by the person with respect to the subject-matter of the order as specified by the Director, and*
(v) *to take any other measure that the person making the order considers necessary to*
(A) *facilitate compliance with the order, or*
(B) *protect or restore the environment,*

(b) *require the person to whom the order is directed to do any work or carry out any measures the Director considers necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 99, and*

(c) *in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.*

ALLOCATING FINANCIAL RESPONSIBILITY

RECOMMENDATION 13:

THE ACT SHOULD CONTAIN A SEPARATE SECTION WHICH ALLOWS THE DIRECTOR TO ALLOCATE THE COST OF DEALING WITH THE CONTAMINATED SITE

The central question is who should pay for containing the contamination or cleaning up the site. This is a financial question. It is not necessarily related at all to the identification of the persor. who is actually going to undertake the clean-up. Assume that all of the clean-up has occurred and the costs are all in: who pays? in what proportion? what excuses relieve against liability? how long does liability last?

None of these questions can be answered satisfactorily if the concept of an environmental protection order assumes that the recipient will not only undertake the clean-up but also bear all of the costs associated therewith.

We think it would be preferable to separate these two aspects of the environmental protection order referred to in section 113 of Bill 53.

The Task Force recommends that--unlike in Bill 53--there be a separate section in the Act allowing the Director to allocate the cost of dealing with the contaminated site among the various responsible persons in whatever proportion is appropriate. (For the purposes of discussion, call this a "cost allocation order".)

A cost allocation order would be separate from the Director's ability under section 113 to issue environmental protection orders requiring specific actions to be taken on the site. The people who are required to take particular actions to deal with the contamination may not be the same people who should bear the financial responsibility for clean-up. Or the degree of their respective fair shares of the cost may differ.

Bill 53 does not explicitly authorize the Director to allocate costs. It only allows him to issue environmental protection orders requiring action on the contaminated site. However, a recipient of an order is liable for the costs incurred in complying with it. Bill 53 does not allow the recipient of the order to shift some or all of the cost of complying with the order to other persons whom it might reasonably be said should, in fairness, bear some of the cost. The recipient is left to whatever remedies might be available under the common law. Litigation would almost certainly be lengthy and difficult; the common law duties may not be clear; responsible parties may no longer be available; and the result of litigation may well be haphazard and unfair. This may discourage people from accepting responsibility even for the physical actions required for clean-up, forcing the Director to do it at government expense, and hoping that the Director does not look solely to that party for the cost incurred. This defeats the very object of the legislation--namely, to deal responsibly with contaminated sites. Sound public policy does not encourage litigation or encourage people to avoid their responsibilities; it attempts to set out clear rules or a clear mechanism for achieving a fair result.

Further, if the Director does have to do the clean-up at government expense, Bill 53 entitles him to look for recompense from any "person responsible"--jointly and severally--without regard to the actual degree of responsibility which the particular person bore for the contamination. The Director can look to the person with the deepest pockets. It is not clear that the Appeal Board would have jurisdiction to overturn the way the Director sought to enforce payment from any person with a deep pocket. It is also not clear that a person would be able to claim contribution from other persons responsible for the contamination. Litigation would undoubtedly result, with all the disadvantages discussed above. The desire to provide an easy mechanism for the government to recoup itself for its expenses does not appear to justify unfairness to the parties.

RECOMMENDATION 14:

THE ACT SHOULD EXPLICITLY ARTICULATE THE PRINCIPLE OF FAIRNESS

The Task Force recommends that the Act should explicitly recognize that the costs of dealing with a contaminated site should be allocated fairly.

As indicated in the next recommendation, the Task Force thinks that the starting point should be to require the polluter to pay for cleaning up the contaminated site. However, it may not always be possible or fair to make the polluter bear all of the costs of dealing with a contaminated site. For example, the polluter and the owner may not be the same person; the polluter may no longer be available; the polluter may have complied with all applicable technical, legal and regulatory requirements when the contamination occurred. It is not necessarily fair to require someone connected to the property to bear all (or any) of the costs of clean-up merely because they have deep pockets.

At the workshop, some concern was expressed about the vagueness of "fairness", and what it would mean in actual practice. The Task Force recognizes this uncertainty. However, it is not possible to provide a mathematical formula which will accurately and fairly allocate the costs of cleaning up a contaminated site - the potential considerations to each site are too numerous to be reduced in a mathematical formula. This is why the Director, and, in the end, the Appeal Board, must have discretion to determine what is a fair allocation of costs in each particular case. Many other boards and governmental agencies exercise discretionary powers having financial consequences for different people with completing interests, where it is not possible to articulate in advance one all-encompassing rule which applies to all circumstances, such as the Energy Resources Conservation Board, the Natural Resources Conservation Board and the Workers' Compensation Board.

The Task Force does not think that the appropriate response to the legitimate concern about certainty would be to abandon the principle of fair allocation of costs. It would be preferable to attempt to reduce the level of uncertainty, rather than adopt a certain, but unfair, system of allocating costs (such as Bill 53's joint and several liability for anyone who might have had some connection with the site, no matter how remote, no matter how blameless).

Some concern was also expressed at the workshop about whether the Director should have to decide how the costs should be allocated, instead of simply casting a wide net over every person in sight jointly and severally and letting them sort out their respective shares of the total costs. The Task Forces does not think that administrative ease should be the criterion for determining how the costs should be borne, nor would it justify an unfair distribution of costs. Joint and several liability is fundamentally incompatible with the concept of fairness. Joint and several liability focuses on the deepest pocket, not in quantifying a particular person's fair share. It is not good policy to encourage litigation. It is also not accurate to assume that the common law would in fact always allow the recipients of a joint and several order to be able to transfer the liability to the particular persons who ought to bear the costs. Administratively, joint and several liability is particularly attractive when the person who ought to pay for cleaning up the site is not available or does not have the resources to do so because joint and several liability would allow the government to extract the costs from someone else who had some connection with the site (perhaps as an innocent owner, who may or may not have deep pockets). The Task Force thinks that the principle of fairness should still govern, and that neither administrative ease nor the difficulties of collection justifies unfairness.

Greater comfort with the concept of fairness could be achieved by (a) articulating the factors which would be considered in determining the fair allocation of costs; (b) articulating the standards for deciding what is a contaminated site, when it would be designated, what level of rehabilitation is required, and what types of action are required; (c) making sure that the procedure used by the Director is and is perceived to be, fair; (d) maintaining the appeal to an independent Appeal Board, which itself has a fair procedure; and (e) the fact that, over time, there will be an acquired body of cases to which everyone can refer.

In the following recommendations, the Task Force has tried to develop principles to be considered in allocating the costs fairly.

RECOMMENDATION 15:

FAIRNESS SHOULD START FROM THE PRINCIPLE THAT THE CONTAMINATOR SHOULD PAY

The Task Force recommends that the Act should articulate the expectation that the polluter will bear the costs of cleaning up the contaminated site. This should be the starting point.

RECOMMENDATION 16:

THE ACT SHOULD NOT ATTEMPT TO DEFINE WITH PRECISION EVERYONE WHO MIGHT BE A "PERSON RESPONSIBLE" FOR THE COSTS OF CLEAN-UP IN ALL CIRCUMSTANCES, NOR THE EXCUSES WHICH WOULD ALLOW A PERSON TO ESCAPE BEARING SOME OR ALL OF THE COSTS–A MORE ELASTIC APPROACH SHOULD BE ADOPTED

The Task Force recommends against including in the Act a comprehensive list or definition of the persons who would be responsible for the cost of cleaning up contaminated sites, or a comprehensive list of the circumstances in which a "responsible person" would escape bearing some or all of the costs of clean-up. On the one hand, it is impossible to identify all the persons who might--at least initially--be looked at to bear some responsibility for contamination. Stating a list implies that anyone left off the list is not responsible; a list freezes the concept of responsibility. On the other hand, the same comments can be made about the circumstances in which a "responsible person" should not be made to bear some or all of the costs of the clean-up.

Instead, the Task Force recommends a different, more elastic and discretionary approach. The Task Force proposes that the Act be structured to:

- set out the principle that the costs of dealing with the contamination should be allocated fairly, taking into account all of the circumstances of the case;
- allow the Director to assess liability for the costs on any person responsible for the contamination;
- contain a wide, non-exclusive list of persons who might be considered to be "candidates" for responsibility (the list would be non-exclusive, so that a person would not escape the possibility of liability merely because the list did not mention them);
- contain a wide, non-exclusive list of circumstances which might excuse a person from liability, either altogether or partially.

The Task Force recognizes that different people may have different concepts of what fairness requires in different circumstances, and that there will be competing claims on how the Director (and the Appeal Board) ought to allocate financial costs in each particular case. Each case is different. That is why our system of government has devised discretionary powers, to be exercised in accordance with certain guidelines, to achieve certain objects, usually with an appeal mechanism built in to increase the perception of fairness.

Some unpredictability necessarily results from this discretionary model. However, it does have the virtue of squarely recognizing that it is impossible to state a precise and fair mathematical formula allocating responsibility which would be applicable in every case. And it has the advantage of clearly articulating the principle of fairness.

RECOMMENDATION 17:

THE ACT SHOULD IDENTIFY A WIDE CATEGORY OF OTHER "CANDIDATES" FOR LIABILITY

After working through the case studies contained in Appendix A, the Task Force identified a wide range of persons who might, in some circumstances, be considered as "candidates" for bearing some financial responsibility for contaminated sites.

The Task Force recommends that the Act contain a non-exclusive list of these candidates for liability:

- The person(s) who caused the contamination (as indicated above, the starting point in the Act would be that the polluter bears the cost of cleaning up the contaminated site).
- The present owner of the site.
- Any previous owner of the site, back to the time the contamination started.
- Any person who arranged to have his own waste taken to the site for disposal or treatment (the generator).
- Any transporter of hazardous material to the site, if that person selected the site.
- Regulatory or governmental authorities who allowed the contamination to occur.
- Anyone who has benefited from the activity causing the contamination.
- Anyone else who might reasonably be said to have been responsible for causing or contributing to the contamination, or who is or was responsible for the site at any time after the contamination started.

RECOMMENDATION 18:

POSSIBLE MITIGATING FACTORS TO BE CONSIDERED IN DETERMINING FAIR SHARE

The Task Force recommends that the Act should contain a non-exclusive list of some of the circumstances which should be considered in determining the fair share of the costs of dealing with the contaminated site which should be borne by a "candidate for responsibility" .

Contaminators

The Task Force has recommended above that the Act recognize the principle that the polluter should be responsible for the costs of cleaning up the contaminated site.

There may, however, be circumstances in which it would not be fair to expect the contaminator to pay. Case Study 2 might be an example.

Some members of the Task Force think that the contaminator should not be held liable for the costs of clean-up if the contaminator had:

- No negligence in dealing with a substance which was known to cause a significant adverse effect on the environment.

- No negligence in dealing with a substance which at the time was not known to cause a significant adverse effect on the environment.

In these cases, "knowledge" would include circumstances where the person ought reasonably to have known, and requires the contaminator to have taken due diligence. The onus for demonstrating why it would not be fair to expect the contaminator to bear all the costs of dealing with the contaminated site should lie on the contaminator.

Other members of the Task Force do not accept these limitations to the unlimited financial liability of contaminators to pay for the costs of cleaning-up the contaminated site. For example, if may be relevant to consider the benefits obtained by the contaminator from its activities, even though the contaminator was not at fault legally or morally.

Owners

The owner of the land may not be the contaminator, and it may not be fair to expect the owner to bear the costs of dealing with the contamination. This principle is already recognized in Bill 53, because section 115 contemplates that it may be appropriate for the Minister to pay compensation to the owner of land who suffers loss or damage as a result of the application of the provisions dealing with contaminated sites. (For example, the value of the land may be diminished by the designation, or as a result of restrictions on its use.)

The Task Force thinks that it may be appropriate to reduce a landowner's liability for clean-up costs if the owner had:

- No knowledge that the substance might cause, was causing or had caused a significant adverse effect to the environment.

- No knowledge that the activities of a third party (such as a tenant) on the owner's land involved a substance that could cause or was causing a significant adverse effect on the land, or involved any negligence if such a substance were known to be involved.

- The owner had no reasonable opportunity to prevent the contamination (such as where the contamination originates from neighbouring land, or where a stranger surreptitiously deposits the contaminant on the owner's land).

Again, in these cases, "knowledge" would include circumstances where the owner ought reasonably to have known, and requires the owner to have taken due diligence. The onus for demonstrating why it would not be fair to expect the owner to bear all or some of the costs of dealing with the contaminated site should lie on the owner.

Most members of the Task Force think that there should be no liability if the owner acquired title by statute, such as a municipality acquiring title for unpaid taxes.

Lenders

Most members of the Task Force agree that it is appropriate to exclude secured lenders from direct financial liability for the cost of cleaning up contaminated sites.

Lenders with claims on the land will be indirectly affected because (1) the value of the land will have diminished because of the designation as a contaminated site, and (2) that may affect the financial ability of the borrower to repay the lender. Similarly, lenders to a contaminator will be indirectly affected because the contaminator's responsibility to pay the clean-up costs may affect its financial ability to repay the lender.

One issue is whether a secured lender should be a "person responsible" for the costs of clean-up (with or without any limitation on amount). The U.S. federal legislation provides that "lenders or persons who have some aspects of ownership primarily to protect a security interest" are not responsible for clean-up costs. The Task Force recommends that this exception be implemented in Alberta.

Another issue involves whether a secured creditor should be able to realize the value of its security on the contaminated land (or on the assets of the contaminator) without taking account of the clean-up costs. This raises complicated questions of constitutional and bankruptcy law. In principle, the Task Force thinks that the clean-up costs should be a prior charge on the land (or assets of the contaminator), but any deficiency should not be borne by the secured creditor.

In all events, if the secured creditor takes part in the business causing the contamination, or has a broader interest in the land, the secured creditor will be a "person responsible" in its own right, and should not be entitled to the limited liability referred to here.

All of the assets of a "person responsible" should be available for paying the fair share of the costs of cleaning up a contaminated site. Thus, there would be no automatic presumption that the amount (say) a contaminator should pay would be limited to the value of the business on the contaminated site, or that an owner's fair share would be limited to the value of the site. These factors would properly be taken into account in determining the amount of the fair share, but would not provide a limitation on

the available resources once the fair share had been determined. On the other hand, the assets of the "person responsible" would refer to the net assets, the equity; the priority of valid secured charges on other property of the "person responsible" would not be affected.

Others

- Someone obeying an order of the Court, with no personal discretion, e.g, a sheriff, bailiff.
- The Task Force reiterates that the list cannot be totally inclusive. Other circumstances may indicate that a particular candidate for liability should not be held financially responsible, or should limit the degree of that responsibility.

RECOMMENDATION 19:

THE ACT NEEDS TO CONTAIN A PROVISION ABOUT PIERCING THE CORPORATE VEIL, etc.

The Task Force recommends that the Act needs to contain a provision about piercing the corporate veil and any other structural arrangements that would allow persons responsible for a contaminated site to escape liability on a technicality.

For example, a multi-national chemical manufacturing company might well create a subsidiary to own the land, and another subsidiary to run the plant which contaminates the site. In at least some circumstances, the parent company should be a "responsible person" for the costs of dealing with the contaminated site, notwithstanding the fact that it in law has separate legal personality from the subsidiary which actually ran the plant which caused the contamination. Franchises, licences and other legal structures could be used in an attempt to insulate the main enterprise from financial liability for cleaning up a contaminated site (or a site which might become contaminated), or to leave empty legal shells holding the real or contingent liability for clean-up.

RECOMMENDATION 20:

THE ACT SHOULD LIMIT THE LIABILITY OF CERTAIN SURROGATES

Conversely, there are circumstances where one person--such as an agent, executor, trustee or receiver--in law assumes the identity of another person, and problems arise when the latter person is a person responsible for a contaminated site. Thus, does an executor of a deceased contaminator assume unlimited personal liability for all clean-up costs, or only to the extent of the contaminator's assets which are being administered by the executor? Similar problems arise with receivers, trustees, agents and other alter egos.

The Task Force thinks that the Act should limit the liability of these surrogates to the property of the person which they are administering. (Of course, if the surrogate's activities make it a responsible person in its own right, then the surrogate will not be entitled to this limited liability.)

RECOMMENDATION 21:

LIABILITY SHOULD GENERALLY BE APPORTIONED FAIRLY, NOT ON A JOINT AND SEVERAL BASIS

Between arm's length parties, the "fair share Principle" is incompatible with the concept of joint and several liability, which focuses on ease of recovery and deep pockets rather than fairness.

If financial costs are to be allocated fairly, then the Act will have to use a different vehicle than the environmental protection order referred to in Bill 53. These orders require physical actions, do not deal with the allocation of costs, and entitle the Director to look to each and every recipient for all of his costs without regard to any fairness relating to any particular recipient.

The Task Force recommends that arm's length parties should not be subject to joint and several liability for any financial cost order made by the Director.

On the other hand, there may be exceptional cases where it would be fair to apply joint and several liability. For example, an enterprise might have organized itself into a number of sister corporations, some of whom have been involved with the contaminated site. The Director should not have to allocate responsibility among these closely related corporate entities. However, other than in exceptional circumstances such as this example, the concept of joint and several liability is inconsistent with this recommendation and unfairly penalizes other parties

The fairness of the Director's allocation would be subject to review by the Environmental Appeal Board. (Note: the Appeal Board does not have this power under Bill 53.)

RECOMMENDATION 22:

THE ACT SHOULD RECOGNIZE THAT NOT ALL COSTS MAY BE RECOVERED--SOCIETY MAY PROPERLY BEAR SOME SHARE

The Task Force thinks that it is simplistic to assume that all contaminated sites result from improper actions or that the costs of clean-up can always be allocated to "responsible persons" who are morally at fault.

In reality, some contaminated sites may have been contaminated unwittingly. Others may have been contaminated at a time when it was not realized a contaminant was involved. Others may have occurred when the contamination was acceptable under the laws and regulatory regimes then in effect, and clean-up may be required because of society's changing expectations about pollution.

Nevertheless, society--through the Legislature--has decided that it is appropriate to take action to deal with these types of contaminated sites, too, and not just ones caused by moral iniquity. It seems appropriate, therefore, that society recognize that we--through the government--all ought to bear at least some of the cost of dealing with those sites. The object is to deal with those sites, not necessarily to allocate blame.

Accordingly, the Act should recognize that it may be fair for society to bear part of the costs of dealing with some contaminated sites (and not just because it is left holding the bag because the government has had to take remedial action itself and cannot find anyone else upon whom to visit financial

responsibility). The Act should not imply (like Bill 53 does) that all of the costs can fairly be borne by non-governmental persons.

RECOMMENDATION 23:

THE ACT SHOULD CREATE A FUND THAT CAN BE USED TO BEAR THE GOVERNMENT'S COSTS IN DEALING WITH CONTAMINATED SITES

Given our perception that the government will in fairness have to bear at least some of the costs of dealing with contaminated sites, the Task Force recommends that a specific fund be identified and dedicated for this purpose.

These costs do not readily lend themselves to the normal departmental budgetary process. They are not necessarily predictable; they do not relate to a recurring line-item of expenditure; and the Department should not have to seek a special warrant to cover these non-budgeted items.

Apart from society's bearing some costs because the proper person is not available or financially viable, the principle of fairness means that society will bear some of the costs of clean-up because (1) regulatory processes were inadequate, (2) standards have changed, (3) it is not possible or practical to identify everyone who has benefited from the activities that caused the contamination. These social costs should be recognized and recouped by the government.

Such a fund would perform different functions: banker, to fund the actions required to deal with the contaminated site pending subsequent collection of the fair share of the costs from the responsible parties; and insurer, to deal with circumstances where a responsible party is not available to bear its share of the costs.

The creation, form, administration and source of revenue of the fund(s) is a subject which a working group on implementation should address (see Recommendation #30)

RECOMMENDATION 24:

THE ACT SHOULD APPLY TO SITES WHICH WERE CONTAMINATED BEFORE THE ACT WAS PASSED, BUT ELAPSED TIME SHOULD BE RELEVANT IN DECIDING ON THE ALLOCATION OF LIABILITY

One of the difficulties with legislation dealing with contaminated sites is that particular standards are going to be applied to particular sites at a particular point in time, and those standards may well be higher than those which prevailed at the time the contamination occurred (or before it was even realized that the particular substance was a contaminant at all). Even if all of the events occur after the implementation of the Act, there will be problems dealing with the fact that changing standards will require action that previously was not contemplated. Sites which were contaminated before the Act is implemented only illustrate the problem of rising standards in a different time-frame.

The point of the legislation is to deal with contaminated sites. In order to do this, one will have to deal with the plea that the site was contaminated in accordance with all laws in force at the time.

The issue is whether this should be a complete defence to any liability, no defence at all, or a factor which should be taken into consideration in determining the overall fair allocation of financial responsibility for dealing with the site.

The Task Force does not think that compliance with applicable laws should be a complete defence to all financial responsibility. Section 112 already recognizes that the Director may designate a site as "contaminated" even though the contamination occurred in compliance with all applicable laws. The Task Force thinks that the person responsible for the contaminated site should also be a candidate for financial responsibility in these circumstances, but compliance with existing standards should be a relevant factor in determining how much financial responsibility the person should bear.

NOTICE

RECOMMENDATION 25:

> THE ACT SHOULD REQUIRE PRIOR NOTICE TO BE GIVEN BY THE DIRECTOR ABOUT ANY PROPOSED DESIGNATION, ANY ENVIRONMENTAL PROTECTION ORDER, AND ANY COST ALLOCATION ORDER

Section 114 should be amended to require prior notice of designation and any environmental protection order.

It should also be amended to refer to any proposed cost allocation order.

GOVERNMENTAL COMPENSATION

RECOMMENDATION 26:

> *SECTION 115 SHOULD AUTHORIZE THE GOVERNMENT TO PAY COMPENSATION TO ANY PERSON AFFECTED BY THE APPLICATION OF DIVISION 3, NOT JUST LAND OWNERS*

Division 3 may cause serious financial consequences to a wider group than just land owners--e.g., a recipient of an environmental protection order, who will not necessarily be a land owner (past or present), yet may incur significant costs. In many cases, this will be unfair. Section 115 recognizes that land owners may be affected by Division 3, and gives the Minister discretion to compensate a land owner who suffers loss or damage as a result of the application of Division 3.

The Task Force recommends that the Minister's discretion to pay compensation under Section 115 should be extended to cover any person affected by any aspect of Division 3, not just land owners.

Similarly, Division 3 may impose considerable administrative expense on local authorities, even if they are not "persons responsible" for paying a fair share of the cost of cleaning up the contaminated site.

Consideration should be given to making sure that this cost to local authorities is recognized and recompensed.

APPEALS

RECOMMENDATION 27:

THE ACT SHOULD RECOGNIZE A WIDER CATEGORY OF PERSONS WHO CAN APPEAL

The Task Force recommends that the appeal provisions in the Act should be broadened somewhat to permit a wider category of persons to appeal to the Environmental Appeal Board under Part 3.

Under section 83(1)(h), only the owner of the land may appeal the designation of a contaminated site. However, the owner may not be the contaminator--although the fair share principle looks to the contaminator to pay for the clean up ahead of the owner. Similarly, neighbouring land owners may be affected by the designation.

Under section 83(1)(f), only the recipient of an environmental protection order can appeal. If our recommendation about cost allocation orders is accepted, presumably the recipient of such an order could also appeal. However, any "person responsible" might be affected by one of these orders, though not the recipient of that order. Neighbouring land owners might also be affected. And it may be that members of the wider community should be able to have the Environmental Appeal Board review the Director's decision about whether the contamination should be merely contained or rehabilitated and to what standard.

Accordingly, we think that any directly affected person should be able to appeal.

COORDINATION WITH OTHER PARTS OF THE ACT

RECOMMENDATION 28:

THESE RECOMMENDATIONS MUST BE COORDINATED WITH OTHER PARTS OF THE ACT.

Bill 53 is a comprehensive statute dealing with many other environmental matters besides contaminated sites. Some of the provisions contained in other parts of Bill 53 could potentially be applied to contaminated sites. For example, an environmental protection order could be issued to clean up a site which was not designated as a contaminated site. Bill 53 contemplates that environmental protection orders engage joint and several liability, which is contrary to the Task Force's recommendation about contaminated sites. It may well be that the principles discussed by the Task Force should apply more generally throughout the Bill, not just to contaminated sites. In any event, the provisions dealing with contaminated sites must be coordinated with the rest of the whole Bill.

MEDIATION

RECOMMENDATION 29:

VOLUNTARY SOLUTIONS SHOULD BE ENCOURAGED.

The Task Force suggests that everything possible should be done to encourage parties to take responsibility for contaminated sites voluntarily. In many cases, the Director may be a facilitator for achieving this result. The Act and government policy should encourage this in the largest number of cases possible.

IMPLEMENTATION

RECOMMENDATION 30:

THE DEPARTMENT SHOULD SET UP A WORKING GROUP TO DEAL WITH IMPLEMENTING OUR REPORT.

The Task Force recognizes that it will not be easy for the Department to implement our recommendations. Guidelines will have to be developed to specify the factors to be taken into account in determining the fair allocation of costs. Our recommendations suggest that more work will have to be done by the Department at the front-end of the process to decide which sites should be designated, what is the appropriate action to be taken, and attempting to have responsible parties deal with the sites voluntarily. In the end, if enforcement is required, the Director will have to take responsibility for making the first determination of how the costs will be allocated; and will have to justify that allocation if it is appealed to the Appeal Board. We recognize that governmental resources are shrinking, and that it is important to devise the most effective system for dealing appropriately with contaminated sites in the most economical manner. We do not think that the difficulties in implementing our recommendations are insuperable, or would justify accepting an unfair system of dealing with contaminated sites merely because it would be administratively easier or more certain.

The Task Force suggests that a multi-stakeholder working group be set up to help the Department deal with implementation .

APPENDIX A

FACT SITUATIONS FOR REVIEW

1. In the 1920's a wood preserving company (which no longer exists) owned a small creosoting plant at a site on the banks of a river. The plant was subsequently expanded and sold to Company ABC, a creosoting company which was at the time a wholly owned subsidiary of a large multinational corporation carrying on business throughout Canada. Company ABC operated the site until the mid-1960's, at which time the plant was shut down, and parcels of the original plant site have since been transferred a number of times to various owners. Currently, the old plant site, which now sits in the middle of a large municipality, is owned by three landowners, two of which are corporations which have no connections to the original wood preserving operations carried out on the property, the third owner being the municipality. Company ABC no longer exists, but its multinational parent still exists and carries on business throughout Canada. The original plant site is now extensively polluted as a result of the wood preserving activities, and will require significant and potentially very expensive remediation work to ensure safety of the site. Who should be a person responsible for the contaminated site?

2. BIG Petroleum used a site from 1957 to 1972 to dispose of hazardous refinery wastes. In 1977 the site was sold by BIG for one-third of the market value to 12345 Co. The sale was accompanied by a restrictive deed, valid for 25 years, transferring liability for site contamination to the purchaser. BIG also registered a caveat against the title to the property advising of the contamination to the site. The site, still owned by 12345 Co., is located in an undeveloped area of a large municipality, raising the likelihood that the property owners could benefit in the future from a significant increase in the property value as the municipality expands, provided the site is cleaned up. Who should be a person responsible for the contaminated site?

3. An oil refinery was developed in a rural area in the late 1940's by Joe's Oils Ltd. and sold to Sam's Refinery Company Ltd. two years later. The site was sold to a national oil company in 1954, and this company covered over disposal pits on the site in 1957. The site was sold to a private individual in 1958, and is currently owned by a couple who had bought the site to use as farmland and were unaware of any contamination on the land at the time of purchase. Substances resulting from the contamination of the site have migrated onto neighbouring property which is owned in part by a national railway and in part by the provincial government. Who should be a person responsible for the contaminated site?

4. A large refinery was built in a rural area in 1939. It was originally owned by Oil and Gas Company #1 and was sold to Oil Company #2 in 1953. After purchase, Oil Company #2 expanded the refinery and changed its name to Oil Company #3. In 1961 the refinery was shut down and decommissioned. Oil Company #3 was amalgamated as Pipeline Company #1 in 1970. The property was subsequently sold to private individuals, the current landowners being a couple who had bought the property to run a camp for inner-city children. The current landowners were unaware of any contamination on the site or of the previous use of the site at the time of purchase. The residential area of the property is one of the more highly contaminated areas of the site, and initial risk evaluations have indicated some limited human health risks at the site. The current landowners have been unable to use the property for its intended use since the discovery of the contamination. Corporate records indicated that Pipeline Company #1 is currently a wholly owned subsidiary of Major National Oil Company Ltd. Who should be a person responsible for the contaminated site?

5. A site where wood preserving operations took place shows signs of contamination as a result of substances used in those operations. The land was owned by ABC Wood Preservers Ltd., which was also the company carrying on the wood preserving operations. In 1990, the municipal district took title to the land due to ABC's failure to pay its property taxes. J. Smith, a director and minority shareholder of ABC Wood Preservers Ltd., lives in the municipal district and is aware of the contamination problems on the site, but has indicated that he does not have the resources to clean up the site. Who should be a person responsible for the contaminated site?

6. ZZ Waste Disposal Corp. carried on the business of disposal of hazardous and toxic waste for clients in Alberta. Various clients, including ink companies, chemical producers, petroleum companies, and the Canadian military, consigned various hazardous and toxic wastes to ZZ for disposal. Portions of these wastes were delivered by ZZ to the landfill of a large municipality, accompanied by documents completed by the company's president and major shareholder, Jane Doe, certifying that the wastes were domestic household wastes and other relatively harmless wastes consigned by clients. Remaining portions of these hazardous and toxic wastes were buried one evening in a field owned by Farmer Brown, without Farmer Brown's knowledge or permission, upon the instructions of J. Smith, the operating general manager of ZZ. Within six months of deposit of the wastes at these two sites, significant contamination was evident. Once the actions of ZZ and the contamination of the two sites came to light, ZZ' finances were severely restricted due to a drop in business and Very Big Bank, holder of various securities granted by ZZ, appointed Penny Pincher Accounting Limited as receiver-manager of ZZ Waste Disposal Corp. Concerned about the receivership and potential costs to her personally, Jane Doe claimed personal bankruptcy. J. Smith suffered a fatal heart attack upon learning of the potentially prohibitive costs of remediation of the contamination caused by ZZ; his estate is currently being administered by his executor. Who should be a person responsible for the contaminated site?

7. A small post preserving company carried on operations on a parcel of land owned by it for 30 years. Contamination has occurred on various areas of the site, with high concentrations of contaminant found in some localized spots on the site. The property was transferred to the Alberta Department of A in 1972; at the time of transfer, the government officials dealing with the purchase were aware that there was likely some contamination on the property. The Alberta Department of B considers the property to be an ideal site to construct a training institute, but does not wish to proceed with any planning or construction until the matter of the contamination is resolved. The post preserving company was struck off the corporate register in 1985 and no longer exists, and the principal operator of the company died in 1987. Who should be a person responsible for the contaminated site?

APPENDIX B

SUMMARY OF PROVISIONS IN OTHER JURISDICTIONS

COMPARATIVE REVIEW - CONTAMINATED SITES LEGISLATION

ONTARIO

The main piece of legislation in Ontario currently governing matters such as contaminated sites and waste issues is the Environmental Protection Act.

Designation and identification of contaminated sites

The Environmental Protection Act (EPA) does not contain provisions which relate specifically to contaminated sites. The Ontario government instead relies on more general provisions related to discharge of contaminants into the natural environment to deal with sites requiring cleanup. These provisions enable the Ministry of Environment to direct parties to control discharges and take remedial action with respect to such discharges.

Ontario also has guidelines entitled "Guidelines for the Decommissioning and Clean-up of Sites in Ontario". These guidelines are applicable to all provincial, municipal and privately owned sites and facilities to be closed down at which environmental contamination may have taken place.

Who is liable for contaminated sites

The main provisions in the EPA dealing with civil liability are found in Part X relating to spills. The owner of a spilled pollutant and the person having control of a spilled pollutant are under a duty to report a spill to the Ministry and to do "everything practicable" to prevent adverse effects and "to restore the natural environment". The definitions of "owner" and "person having control" relate to the owner and person having control of the spilled pollutant immediately before the first discharge of the pollutant. Any reference to the owner or person having control of a spilled pollutant also includes successors, assignees, executors or administrators of those persons.

When a spill has occurred, the Minister may make orders to any of a number of specified parties to require the doing of everything practicable to prevent adverse effects and restore the natural environment. Parties to whom an order may be directed include:

1) any owner of the spilled pollutant
2) any person having control of the spilled pollutant
3) any owner or person having charge, management or control of real or personal property affected by or which may be affected by the spill
4) the municipality in which the spill occurred
5) any municipality contiguous to the municipality in which the spill occurred
6) any municipality which is affected by or may be affected by the spill
7) any public authority
8) any person who is or may be adversely affected by the spill or whose assistance is necessary

The Act imposes absolute liability on owners and persons having control of spilled pollutants for cleanup costs incurred by the government or by other persons directed to clean up. Strict liability is imposed

on owners and persons having control of spilled pollutants for "loss or damage incurred as a direct result" of a spill. "Loss or damage" is broadly defined to include personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. A limited due diligence defence is available; however, this defence does not apply with respect to the costs of cleanup. The Act also imposes joint and several liability.

Exceptions to liability for contaminated sites

Ontario's Ministry of Environment currently maintains a policy enabling it to enter into private agreements with receivers, trustees or secured creditors of liable parties to limit the potential environmental liability of the receivers, trustees and secured creditors. The basic principle is that the secured creditor (or other party) will not be liable beyond its net recovery. Agreements are entered into to allow the secured creditor to realize upon its security without prejudicing the ability of the Ministry to require remedial action to be taken where necessary.

A recent Ontario Court of Appeal decision appears to limit the situations in which the Ministry can issue orders to owners or occupants of contaminated sites. The effect of the decision in the Northern Wood Preservers case would seem to relieve owners and occupants from being issued such orders if they took control of the property after the contamination to the natural environment occurred.

Appeal mechanisms with respect to liability

Part X of the EPA provides for matters of compensation and cost recovery to be dealt with by the courts.

COMPARATIVE REVIEW - CONTAMINATED SITES LEGISLATION

BRITISH COLUMBIA

The main piece of legislation in British Columbia currently governing matters such as contaminated sites and waste issues is the Waste Management Act. At present, British Columbia has little legislation directed specifically towards contaminated sites, but is in the process of developing such legislation. A detailed discussion paper entitled New Directions for Regulating Contaminated Sites: A Discussion Paper ("the discussion paper") was released for public review and comment in January 1991. It should be noted that any new contaminated sites legislation enacted by British Columbia will supplement rather than replace the Waste Management Act.

Designation and identification of contaminated sites

BC Environment currently employs various measures in identifying contaminated sites, as follows:

1) voluntary disclosure by developers
2) referrals from municipalities with respect to development proposals
3) pollution abatement orders under the Waste Management Act directing a person who had possession, charge or control of a polluting substance to provide information on the substance and to undertake investigations, tests and surveys to determine the extent and effects of the pollution
4) provisions of the Special Waste Regulation requiring operators of special waste facilities to comply with reporting requirements
5) administration of permits and other approvals under the Waste Management Act related to introduction of waste into the environ ment
6) orders to disclose information in cases of emergencies under the Waste Management Act

The discussion paper contemplates a legislative scheme which would establish a general duty to report to the government where contamination problems might be evident or identifiable. This reporting would take the form of "preliminary assessments" of the extent of contamination on a site, providing information sufficient for the government to determine whether more detailed assessment of the site is required. Possible triggers for preliminary assessments include:

1) development or redevelopment applications
2) applications for municipal permits to remove or deposit soil to or from a site
3) decommissioning of industrial or commercial facilities
4) rehabilitation or redevelopment of industrial or commercial facilities
5) waste permit applications and amendment applications for discharges to land or storage of special waste
6) discovery of a contamination proble by provincial and municipal authorities by any other means

Some of these triggers may have automatic effect, while others would be discretionary, with a Ministry official being given the authority to require a preliminary assessment. Power to require more detailed assessments would also be given to a Ministry official.

Who is liable for contaminated sites

Currently, section 22 of the Waste Management Act enables a Manager of the Ministry of the Environment to order a person who had possession, charge or control of a polluting substance, any other person who caused or authorized the pollution or a current or past owner or occupant to carry out investigations and remediation. This provision also gives broad authority for assigning cleanup costs to persons who originally caused the problem.An identified concern is that section 22 creates uncertainty in predicting which parties may be liable in any particular situation, as no guidance is given on applicable principles of liability. Retroactive application of liability is clear from the Act and persons named in an order are intended to be fully liable.

The discussion paper contemplates that liability for cleanup costs should be governed by the "polluter pays" principle, with "polluters" including those persons who actually operated a site and discharged hazardous contaminants as part of the operations, as well as those persons who contributed, directly or indirectly, to pollution on a particular site. Consideration is being given to designating four classes of "responsible persons" who may be potentially liable for cleanup costs. These classes would be similar to those commonly found in US legislation, as follows:

1) current owners of contaminated sites
2) past owners or operators who owned or operated the site at the time that the hazardous substance was deposited on the site
3) generators of waste who arranged to deposit the waste on the contaminated site
4) transporters who accepted hazardous substances for transport to facilities they selected and from which there was subsequently a release or threatened release

The discussion paper proposes that "responsible persons" would be candidates for liability, with a designated Environment official having the discretion to determine which sites should be remediated and which responsible persons should contribute to the costs of cleanup. Actual liability would only result from the issuance of an order under the Waste Management Act. Public input received on the discussion paper generally was critical of any approach which would vest or provide broad discretion to an Environment official to determine the liability of responsible persons in each instance.

In British Columbia, there appears to be considerable support for the determination of contaminated sites on the basis of guidelines and standards. Under this scheme, once a site is designated as a contaminated site, liability will attach automatically to responsible persons by operation of statute without the need for an order. Remediation orders may be used as a backup tool to compel action by uncooperative responsible persons.

The intent of British Columbia's contaminated sites initiative is for liability to be absolute, retroactive and joint and several. Harsh effects caused by this imposition of liability may be mitigated by exemptions from liability or options such as mediation or alternative dispute resolution.

Exceptions to liability for contaminated sites

In a new legislative scheme for contaminated sites, strict liability would be applied to landowners. Where owners did not know of the existence of the contamination and exercised all due diligence in site maintenance, including prevention of releases of hazardous substances, no liability would arise. No protection would be provided for purchasers who purchase property without inquiring into the possibility of contamination and have not investigated the site in a reasonable manner.

The discussion paper suggests that any harshness caused by joint and several liability could be mitigated by the use of "apportionment" guidelines as well as by the use of mediation among responsible parties. As well, there is the possibility that the government could exercise a discretionary power to indemnify those parties who are likely to suffer a patent unfairness as the result of an order imposing liability.

Various exemptions from liability found in other jurisdictions are under review to determine their appropriateness in the BC context. Examples of these exemptions include:

- where government involuntarily acquires title to property or control of property

- where a party holds legal instruments primarily to protect its security interest in the site (secured creditor's exemption)

- where releases or deposits of substances occurred pursuant to relevant statutes or permits issued under relevant laws

- where the contamination was caused solely by an act or omission of a third party other than an employee or agent of the responsible party

- where a mortgagee acquires title by foreclosure (in some jurisdictions, liability is limited to the value of the property)

- where an owner purchases the site without knowledge of the presence of the contaminating substance on the site

It is indicated in the discussion paper that consideration should also be given to whether liability should be imposed on receivers, receiver-managers, trustees in bankruptcy, corporate directors and professional advisors (i.e. realtors, environmental consultants, and lawyers). As well, it is anticipated that there will be a need to legislate upper limits on liability of government agencies or officials, including any municipalities or agencies to which responsibility is delegated under contaminated sites legislation.

Based on public input received with respect to the discussion paper, it is anticipated that the contaminated sites legislation could allow for agreements to be entered into between the manager and responsible parties to limit liability. These orders would generally be used to limit the liability of responsible parties who would bear relatively low proportions of the costs and responsibility for the contaminated site and its cleanup. As well, it is anticipated that expert alternative dispute resolution panels would be made available to responsible parties to assist in attempts to reach agreements on apportionment of costs and responsibility. However, the basic premise in contaminated sites legislation would be that joint and several liability will apply.

Appeal mechanisms with respect to liability

The Waste Management Act provides that decisions made by the Manager may be appealed to the Director. Decisions made in the first instance by the Director or made by the Director as a result of appeals from decisions made by the Manager may be appealed to the Environmental Appeal Board.

The discussion paper proposes that the assignment of liability by an Environment official to any of various responsible persons would be made subject to the appeal process currently set out in the Waste Management Act.

COMPARATIVE REVIEW - CONTAMINATED SITES LEGISLATION

UNITED STATES (FEDERAL LEGISLATION)

The main piece of federal legislation in the United States dealing with the cleanup of contaminated sites is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Designation and identification of contaminated sites

CERCLA is applicable to abandoned and inactive hazardous waste sites. The legislation also gives the federal government the mandate to provide federal assistance in toxic emergencies.

Who is liable for contaminated sites

Liability is triggered by a release or threatened release of a hazardous substance into the environment which causes the government to incur expenses or costs in site cleanup. "Release" is defined very broadly as "any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment".

Initial cleanup costs are paid from the Superfund, funded primarily through taxes levied against industry on chemicals. The government may then seek to recover from liable parties cleanup costs paid out of the Superfund.

Liability is imposed by CERCLA on four classes of persons:

1) the present owner or operator of a site
2) any past owner or operator who owned or operated the site at the time that the hazardous substance was deposited on the site
3) any person (generator) who arranged to have his own waste taken to the site for disposal or treatment
4) any person who transported the hazardous substance to the site, if that person selected the site

American courts have imposed liability retroactively to hazardous waste generators, transporters and landowners, and have imposed liability regardless of whether these persons were in compliance with environmental laws or were using state of the art disposal methods at the time. As well, the courts have interpreted CERCLA as imposing joint and several liability as between those parties who are liable under the Act and have also interpreted the Act as imposing absolute liability on these parties.

Exceptions to liability for contaminated sites

Innocent property owners are not liable if, at the time of acquisition, they "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility" or they acquired it by inheritance or bequest. The landowner bears the onus of proving that he or she is an innocent landowner. CERCLA distinguishes between innocent landowners and sophisticated investors, providing that "the court shall take into account any specialized knowledge or experience on the part of the defendant...and the ability to detect... contamination by appropriate inspection".

Other exceptions include:

1) lenders or persons who have some aspects of ownership primarily to protect a security interest
2) transporters if they were not responsible for selecting the site
3) municipalities which acquire title to contaminated land involuntarily, such as through tax recovery proceedings
4) Indian tribes
5) cleanup contractors, unless they negligently or intentionally contribute to the release of the hazardous substance

The secured creditor's exemption has been narrowed by the American courts such that the lender's capacity to influence the borrower's hazardous waste decisions by the lender's participation in the financial management of the facility would void the exemption otherwise available to the lender. The US Environmental Protection Agency is proposing a lender liability rule which would clarify the secured creditor's exemption and instances in which lenders will not bear liability. The proposed rule sets out activities which may be undertaken by the security holder without triggering liability for cleanup costs, as follows:

1) requiring facility cleanup prior to or during the life of the loan
2) requiring assurances of compliance with environmental laws from the facility owner or operator
3) regular monitoring or inspection of the facility and the owner's financial condition
4) providing advice (financial or otherwise) to a financially troubled debtor
5) taking actions necessary to "police" the debt or obligation
6) undertaking activities for loan workouts
7) foreclosing on security, winding up operations and liquidating assets to recover the security interest

It should be noted that under the proposed rule, actual participation in the management or operation of the facility by the secured creditor will void the secured creditor's exemption.

Amendments to CERCLA encourage the Environmental Protection Agency to enter into settlements with de minimus (minor) contributors, with such settlements covering only a minor portion of the response costs for a site. Any de minimus agreement will provide for contribution protection of a settling party, against parties who do not settle, for matters addressed in the settlement.

Appeal mechanisms with respect to liability

Generally speaking, any appeals provided for in CERCLA are to the courts.

COMPARATIVE REVIEW - CONTAMINATED SITES LEGISLATION

NEW JERSEY

The main piece of legislation in New Jersey currently governing cleanup of contaminated sites is the Environmental Cleanup Responsibility Act.

Designation and identification of contaminated sites

The Act applies to "industrial establishments", which are defined as "any place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or wastes on-site, above or below ground...". It should be noted that industrial establishments do not include establishments engaged in the production or distribution of agricultural commodities. Sites become subject to the application of the Act upon the closing of operations or the transfer of operations.

Who is liable for contaminated sites

The owner or operator of an industrial establishment, prior to closing down or transferring operations, must notify the Department of Environmental Protection. As well, the owner or operator must provide the Department with either a "negative declaration", which is a written declaration setting out that either there has been no discharge of hazardous substances or wastes on the site or that any such discharge has been cleaned up in accordance with procedures approved by the Department, or a cleanup plan together with a surety bond or other financial security equal to the cost estimate for the cleanup plan. Cleanup responsibility may be assumed by the purchaser, transferee, mortgagee or other party to the transfer of the operations.

Failure by the transferor to comply with the Act is grounds for voiding the transfer of operations. The owner or operator is then absolutely liable for all cleanup and removal costs and for all direct and indirect damages resulting from the failure to implement the cleanup plan.

Exceptions to liability for contaminated sites

If the premises subject to the transfer will be subject to substantially the same use, the parties may apply to the Department for approval to defer the site cleanup until the site use changes or the purchaser closes, terminates or transfers operations.

Appeal mechanisms with respect to liability

The Act does not provide for an appeal mechanism.

COMPARATIVE REVIEW - CONTAMINATED SITES LEGISLATION

WASHINGTON STATE

The main piece of legislation in Washington state currently governing cleanup of contaminated sites is the Washington Model Toxics Control Act.

Designation and identification of contaminated sites

The Act enables the Department of Ecology to initiate investigations of hazardous waste sites after receiving information that the site may pose a threat to human health or the environment. The Department may investigate or require any potentially liable person to investigate any releases or threatened releases of hazardous substances, and may conduct or require potentially liable persons to conduct remedial actions with respect to releases or threatened releases of hazardous substances.

Who is liable for contaminated sites

The Act refers to "potentially liable persons", which are persons whom the Department finds liable under the provisions of the Act. The Department must make its finding of liability based on credible evidence and must give any such person notice and an opportunity for comment before the finding of liability is made.

Various classes of persons are liable under the provisions of the Act, as follows:

1) owner or operator of a facility
2) any owner or operator of a facility at the time of disposal or release of hazardous substances
3) any person who owned a hazardous substance and arranged for disposal or treatment of the substance at the facility, or arranged for transport of the substance to the facility for disposal or treatment, or otherwise generated hazardous wastes disposed of or treated at the facility
4) any person who transported a hazardous substance to a facility selected by that person at which there is a release or threatened release which requires remedial action, unless the facility, at the time of disposal or treatment, could legally receive such substance OR who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that the facility is not operated in accordance with Washington law
5) any person who sells a hazardous substance and is responsible for written instructions for its use if the substance is used according to its instructions and the use constitutes a release for which remedial action is required at a facility.

All persons liable under the Act are absolutely liable, jointly and severally, for all costs of remedial actions and for all natural resource damages resulting from the release or threatened release of hazardous substances.

Exceptions to liability for contaminated sites

A due diligence defence is available where it can be established that the release or threatened release of hazardous substances was caused solely by an act of God, an act of war, or an act or omission of a third party other than an employee or agent or a person whose act or omission occurs in connection with a contractual relationship with the person claiming the defence. The person asserting the defence must have exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions.

An owner, past owner or purchaser of a facility may be exempt from liability if they can show that, at the time that they acquired the facility, they had no knowledge or reason to believe that any hazardous substance was released or disposed of at the facility. All appropriate inquiries must have been made into the previous ownership and uses of the property, at the time of acquisition of the facility. Any court

interpretation of the applicability of this exemption must take into account any specialized knowledge or experience on the part of the person, the purchase price and its relation to the value of the land if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate inspection. The defence is not available if the person had actual knowledge of the release or threatened release of a hazardous substance when he or she owned the property and subsequently transferred the property without first disclosing such knowledge to the purchaser. As well, the defence is not available to any person who by any act or omission caused or contributed to the release or threatened release.

An exemption from liability is granted to any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling where the person is a resident of the dwelling, assists the resident in the use of the substance without compensation, or is employed by the resident but is not an independent contractor. An exemption is also granted to any person who, for the purpose of growing food crops, applies pesticides and fertilizers without negligence and in accordance with all applicable laws and regulations.

The Act enables the Department to enter into settlements with any potentially liable person if the Department finds, after public notice and hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances. In those situations, a settlement agreement is entered as a consent order of the court.

Appeal mechanisms with respect to liability

The Department's decisions regarding liable persons are reviewable exclusively by superior court and may only be reviewed in conjunction with certain suits which may be brought under the Act. The court must uphold the Department's decisions unless they were "arbitrary and capricious".

The following papers were prepared as briefing material for the Contaminated Sites Liability Issues Task Force, for information purposes only. They are not intended to be a comprehensive analysis or in any way to represent the positions of the government in any of the jurisdictions referred to in the materials.

APPENDIX C

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